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729059—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 887

GERALD DAVID HUDSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On August 31, 1945, petitioner was indicted (R. 1–2) in the United States District Court for the District of Kansas in one count charging that he wilfully failed to report for induction on August 6, 1945, as ordered by his local board, in violation of Section 11 of the Selective Training and Service Act of 1940. At petitioner's trial before the court, a jury having been waived (R. 5, 9), it was undisputed that petitioner was finally classified I–A by his board of appeal, that he was ordered to report for induction on August 6, 1945, and that he refused to report, thereby foreclosing a final determination as to his acceptability by the Army at the induction station

(R. 18, 37). For his defense, petitioner contended that he should have been exempted from military service as a minister of religion and in support of this defense he was permitted to place in evidence the material contents of his selective service file (R. 21) and to adduce, in addition, *de novo* evidence bearing on his asserted ministerial status (R. 22–39).

The trial court reviewed petitioner's selective service classification and concluded: "After reviewing all the files, everything that has been offered in evidence I think I concur with the views of the draft board, he is not a minister of religion under the terms used in the Act and, therefore, is not exempt. * * * If this young man is a minister then every officer in organized religious work is a minister, members of the board of deacons, board of stewards, so I cannot disagree with the findings of the draft board" (R. 39–40). Accordingly, petitioner was convicted and sentenced to imprisonment for three years (R. 9–10). Upon appeal to the Circuit Court of Appeals for the Tenth Circuit, the judgment of the district court was affirmed (R. 85). The circuit court of appeals held that petitioner had failed to exhaust his administrative remedies and that the decision in *Estep* v. *United States,* 327 U. S. 114, did not entitle him to challenge the legality of his selective service classification in his criminal trial for refusing to report for induction (R. 84–85).

The present petition for a writ of certiorari rests principally on the contention that the decision of the Circuit Court of Appeals for the Tenth Circuit is in conflict with the decision of the Second Circuit in *United States* v. *Balogh*, 157 F. 2d 939. On January 20, 1947, after the petition was filed in the instant case, this Court, on the Government's petition (No. 800, this Term), granted certiorari in the *Balogh* case and vacated the judgment of the Circuit Court of Appeals for the Second Circuit on the authority of *Falbo* v. *United States*, 320 U. S. 549, upon which the court below in the present case rested its decision (see R. 84–85). As petitioner argues (Pet. 7–8), the present case cannot be distinguished from the *Balogh* case, for in both the registrant failed to report for induction and thereby failed to undergo the final physical examination at the induction station.

On the authority of the *Falbo* and *Balogh* decisions we respectfully submit that the decision below is correct and that the petition for a writ of certiorari should be denied.

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v.

UNITED STATES OF AMERICA, *Respondent*

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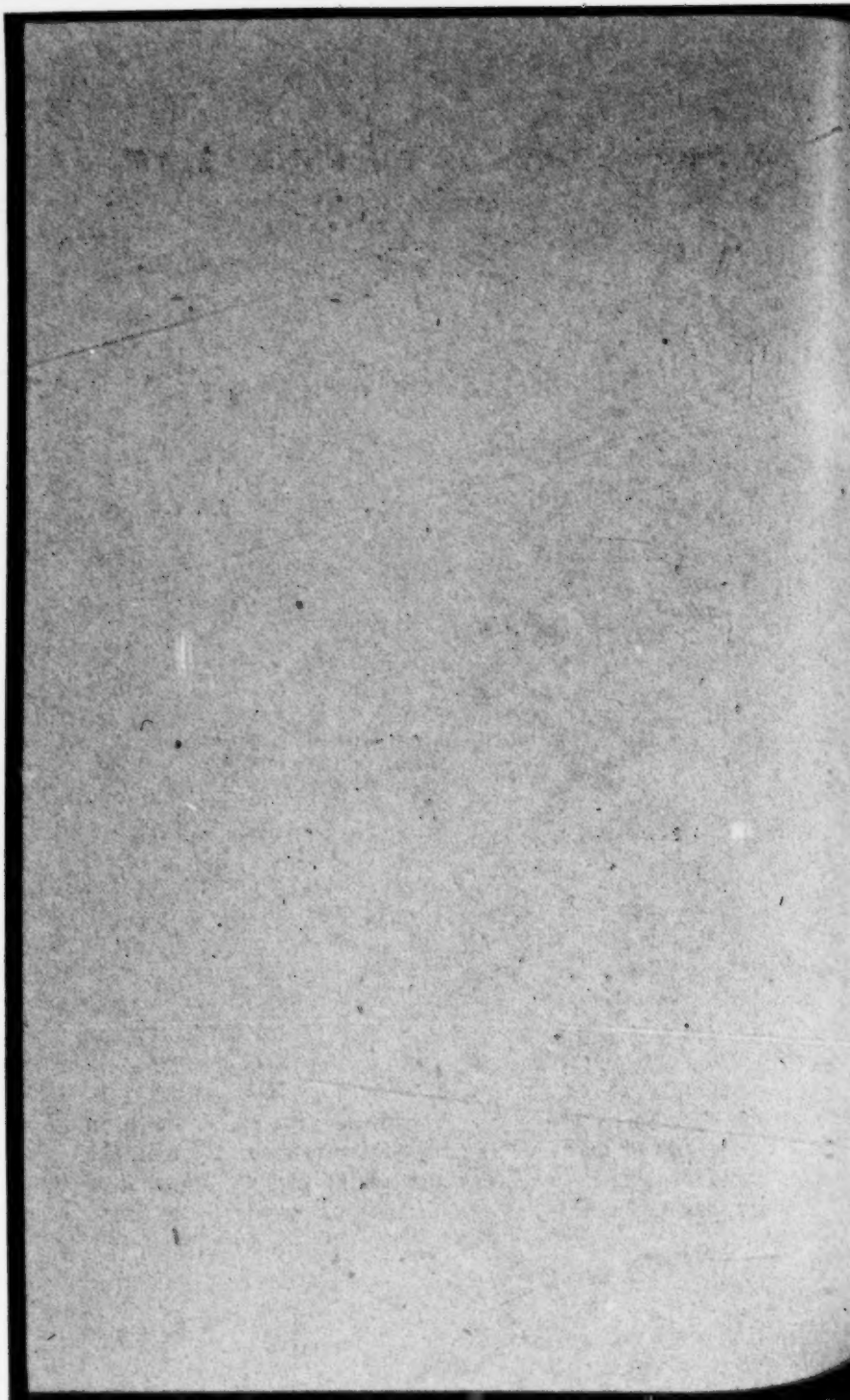
ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPLICATION
for Bail Pending Disposition of Writ of Certiorari

HAYDEN C. COVINGTON
Counsel for Petitioner



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TO THE SUPREME COURT OF THE UNITED STATES:

Now comes the petitioner, Gerald David Hudson, and presents for consideration his application for bail pending a disposition of his case upon a writ of certiorari. As ground therefor he states that this case "involves a substantial question which should be determined by the appellate court." Rule 48 (a) (2), Rules of Criminal Procedure.

Application for bail pending appeal was made to the district court and granted. (See record, page 14) On April 15, 1946, the court of appeals refused the petition for a stay of mandate and thereafter refused to recall the mandate pending determination of the petition for writ of certiorari. (R. 96, 98) Petitioner has now entered upon

service of the sentence imposed. He is now confined at the Medical Center for Federal Prisoners at Springfield, Missouri, where he is held in custody pending disposition of the petition for writ of certiorari.

The question presented is correlative to that involved in *United States* v. *Balogh*, No. 800 October Term 1946 pending on a petition for rehearing. That case arises under the same Act and the same Regulations as are to be considered in this case. Since bail was granted in the *Balogh* case, it should be allowed in this case. See the petition for writ of certiorari and the Respondent's Memorandum in Opposition in the *Balogh* case, for a discussion of the substantiality of the question presented.

The reason petitioner desires bail is plain. It will restore his liberty which was taken away from him by the execution of sentence. If the judgment below is reversed and the case remanded for a new trial on which new trial he is again convicted, he will be required to serve another sentence, which will be two sentences served for one offense. If upon another trial he is acquitted, then his service of this sentence or any part thereof will be unjust. It is fundamental that to avoid injustice bail should be allowed where a substantial question is involved on an appeal. There is no way of restitution of the service of an illegal sentence in a criminal action. Therefore every reason inheres to give to a defendant contesting a judgment on appeal in a criminal case the same right that a defendant contesting a money judgment in a civil case has upon appeal, which is freedom from obligation to satisfy the judgment until the appeal is determined. Consequently it is time enough for a citizen to pay a judgment rendered against him when it becomes a final judgment upon appeal, especially where his adversary may be protected against loss by bond.

The reason this application is being made to the Court, instead of to the Circuit Justice, is on account of the fact that an application was made to the Circuit Justice on January 22. The Circuit Justice declined to immediately

consider the application because of doubt as to his authority to act. Counsel for petitioner, as well as the Circuit Justice, is in doubt about whether the Court or the Circuit Justice has jurisdiction in this matter. This doubt results from a construction that has been placed on the Federal Rules of Criminal Procedure in the *Gibson* and *Dodez* cases. When application for bail was renewed after the writ of certiorari had been granted in the *Gibson* case, it was submitted to the Circuit Justice, but when bail was allowed the order granting bail was made by the Court. When application for bail was made in the *Dodez* case, simultaneously with the petition for writ of certiorari, in that case the bail was allowed by the Circuit Justice. Rule 46 (a) (2) of the Federal Rules of Criminal Procedure, providing for bail upon appeal or certiorari, is substantially a restatement of Rule 6 of Criminal Appeals Rules (See Federal Rules of Criminal Procedure, New York University School of Law, 1946, pp. 80-81, 83, 194, 216, 240.) Rule 38 (b) (c) prescribing orderly procedure in applications to a Circuit Justice for bail is a substantial re-statement of the existing law. The practice under the Statutes and the Criminal Appeals Rules would therefore seem to control the present procedure as was held in reference to the bill of discovery rules in *Hickman* v. *Taylor*, by this Court January 13, 1947, 15 LW 4139. The only decisions in reference to bail are the ones by Mr. Justice Black in *Simon* v. *United States* (unpublished opinion) and the decision of Mr. Justice Butler in *United States* v. *Motlow*, 10 F. 2d 657, to which decision reference is here made. In *Olmstead* v. *United States*, 277 U. S. 438, Mr. Justice Sutherland, acting as the Circuit Justice, admitted the petitioner to bail after the Court granted certiorari. His order is to be found in the Clerk's Files in Nos. 493, 532, and 533 October Term 1927. The importance of clarifying the procedure as to when, where, and how a petitioner may be admitted to bail by this Court and by a Circuit Court Justice warrants an explanation from this Court for the guidance of members of the Bar.

Wherefore petitioner prays that in event the writ of certiorari is granted he be admitted to bail pending the consideration of his case and the decision of this Court.

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